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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-1180

HUGO A. PINELL, JOHN L. SPAIN, LUIS N. TALAMANTEZ, WILLIE TATE, DAVID JOHNSON, and FLEETA DRUMGO,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On January 17, 1974, the Superior Court of the State of California for the County of Marin filed an order quashing a five-count murder indictment which had been returned against petitioners by the Marin County Grand Jury on October 1, 1971 (see, Pet. App. B). That order is unreported.

On December 3, 1974, the California Court of Appeal filed an opinion reported at 43 Cal.App.3d 627,

117 Cal.Rptr. 913, reversing the order setting aside the indictment (see Pet. App. A).

On January 29, 1975, the California Supreme Court, without opinion and without dissent, denied petitioners' application for a hearing (Pet. App. C).

JURISDICTION

The jurisdiction of this Court is invoked under Title 18, United States Code, section 1257(3).

QUESTIONS PRESENTED

I. Whether Latin-Americans, young adults and low income blue-collar workers, were constitutionally cognizable groups in Marin County when the 1971 grand jury which indicted petitioners was selected.

II. Whether the 1971 Marin County grand jury panel was selected in compliance with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

SUMMARY OF ARGUMENT

Petitioners allege that four classes of citizens were subject to impermissible discrimination in the selection of the 1971 Marin County Grand Jury: blacks, young people (age 21-29), low wage blue-collar workers and Latin Americans.

I. It is California's position first, that three of the above classes were not constitutionally cognizable groups for purposes of grand jury selection.

A. As argued more fully below, we submit that age group 21-29 is not a constitutionally cognizable group. Nearly all federal courts have refused, as a matter of law, to impose age standards on grand jury selectors. See, *Carter v. Jury Commission,* 396 U.S. 320, 332-333 (1970); *Hamling v. United States,* 418 U.S. 87, 137 (1974); *United States v. Greene,* 489 F.2d 1145, 1149 (D.C. Cir. 1973) and cases there cited; *United States v. Ross,* 468 F.2d 1213, 1217 (9th Cir. 1973); *cf. United States v. Butera,* 420 F.2d 564 (1st Cir. 1970).

B. The alleged class low wage blue-collar workers is flawed by uncertainty and overinclusiveness. It is common knowledge and the census shows that many workers in craft occupations earn very high annual incomes. Thus, the group low wage blue-collar workers is a contradiction in terms and not cognizable for grand jury selection purposes. *Quadra v. Superior Court of City and County of San Francisco,* 378 F.Supp. 605, 621-622 (N.D.Cal. 1974) and cases there cited.

C. As used by petitioners, the term "Latin Americans" confuses discrete classes of citizens. It is alleged to include Spanish language citizens and Spanish surnamed citizens, groups defined by the census, as well as "Chicanos" and "Latinos",

groups not defined by the census. As such, the group "Latin Americans" is overinclusive and ambiguous and hence not a cognizable group for purposes of grand jury selection. Indeed, in the state courts petitioners' emphasis was on the "Chicano" group, not "Latin Americans".

Identification of either group is thus statistically difficult under the census. There were no geographical concentrations of the group in the county, the group had not established any ethnic organizations in the county and most importantly the "Chicano" group constituted only a very small proportion (3,000 persons or about 1.5 percent) of the Marin County population. Thus, while "Latin Americans" may well be a cognizable group in San Antonio, Texas, that is not the case in Marin County. *Hernandez v. Texas,* 347 U.S. 475, 479-480 (1954).

II. At all events, it is California's position that the grand jury was selected in compliance with the Equal Protection Clause in that:

A. There is no evidence whatever of intentional discrimination. *Hamling v. United States, supra,* 418 U.S. at 138; *Swain v. Alabama,* 380 U.S. 202 (1965).

B. The undisputed evidence shows that the judges who selected the panel exercised affirmative efforts to obtain a fair cross-section of the county, including blacks, young adults and low income blue-collar workers.

C. Blacks were overrepresented on the panel (6.7%) compared to their number in the population (2.4%).

D. Statistical underrepresentation of the young and low income blue-collar workers despite the selectors' affirmative efforts was adequately explained by the fact that educational, family, and financial obligations made them unwilling or unable to afford the time necessary for grand jury service.

E. Absence of "Latin Americans" or "Chicanos" on the panel was adequately explained by evidence that:

1. Identification of this group was statistically difficult under the census;

2. That the group was geographically dispersed throughout the county;

3. That the group had not established any ethnic organizations in the county;

4. That the group constituted only a very small proportion (1.5 percent) of the county population.

5. Spanish language and Spanish surname persons were fairly represented on the panel.

F. No evidence of intentional discrimination or statistical underrepresentation in any prior years was presented by petitioners.

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment XIV, Section 1:

> ". . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On October 1, 1971, the Marin County Grand Jury returned an indictment charging all six petitioners herein with five counts of murder (Cal. Pen. Code § 187), and one count of conspiracy (Cal. Pen. Code § 182); charging petitioners Pinell, Talamantez and Spain with violation of California Penal Code section 4500 (assault with a deadly weapon by a life prisoner); charging petitioners Tate, Drumgo and Johnson with violation of Penal Code section 4501 (assault with a deadly weapon by a non-life prisoner) (CT 1-8). Prior convictions were also alleged against all of the petitioners herein, who were state prisoners at the time of the alleged crimes which were committed on August 21, 1971 (CT 8-11). Lenthy pretrial proceedings ensued (see, e.g., *Drumgo v. Superior Court,* 8 Cal.3d 930, 106 Cal.Rptr. 631 (1973).

On September 17, 1973, petitioner Spain filed a motion to set aside and quash the indictment. All petitioners herein joined in that motion (CT 171).

On January 17, 1974, after a lengthy evidentiary hearing before a judge from another county, an order

granting the motion to quash was issued (CT 171-295).[1]

The People filed notice of appeal on January 18, 1974 (CT 296-297). On December 3, 1974, the Court of Appeal reversed and remanded the matter for trial. Jury trial has since commenced and is presently underway.

STATEMENT OF FACTS

A. Mechanics of Selection of Grand Jury.

The 1971 Marin County grand jury was made up of nineteen persons,[2] randomly drawn,[3] from a panel of thirty nominees[4] (RT 848-850).

The panel was selected by the county's five superior court judges[5] acting in concert (RT 948). They were aided in making their selections by their solicitation by letter of suggestions from some 79 civic and social groups in the county (RT 877-881, 1116-1117). Seventy-five suggested names were received by the judges from these organizations (RT 947, 1081). In addition, the judges considered some thirty other prospective

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[1]On September 11, 1974, the selection and composition of the same 1971 Marin grand jury had been upheld in another case which is now pending on appeal in the California Court of Appeal. We refer to *People v. Gibson and Justice*, 1/Crim. No. 12598, in the files of said Court. In addition, the selection of the 1970 Marin County grand jury was upheld in *People v. Angela Y. Davis*, Marin Superior Court No. 4094.

[2]As prescribed by then California Penal Code section 888.2.

[3]As prescribed by then California Penal Code section 900, 902.

[4]As prescribed by then California Penal Code section 904.

[5]As prescribed by then California Penal Code section 896.

nominees not suggested by any organizations. Some of these were persons known to the judges, some were volunteers and some were based upon suggestions from other independent sources (RT 945, 1344, 1366).

Each of these 105 nominees was sent a questionnaire, which was used as an initial basis for elimination and selection (RT 973-974). A consensus process was then utilized by the judges to reduce the total 105 suggested nominees to the thirty-member panel (RT 1446). The judges agreed unanimously on the 30 nominees selected (RT 951-952, 974-977). Of the thirty selected, sixteen had been suggested by the civic groups, twelve were suggested by the judges and two apparently were volunteers (RT 1448-1450, 1494, 1281).

B. The Testimony of the Judges.

The five superior court judges who participated in the selection of the 1971 grand jury were called by the defense and testified as follows:

Judge Samuel Gardiner:

Judge Gardiner was on the superior court bench from 1964 to 1972 (RT 921, 1033-1034) and was presiding judge when the 1971 grand jury was selected (RT 920-921). He indicated that the major problem that the judges had in selecting the grand jury was to find people willing to serve and interested enough to attend the committee meetings (RT 923). Accordingly, in 1971, the judges, for the first time sought to augment their own personal search for nominees

by seeking suggestions from civic organizations throughout the county (RT 923).

As presiding judge, Judge Gardiner on January 18, 1971 (RT 945), sent the list of nominees submitted by the organizations to his colleagues for their individual evaluation in preparation for their joint selection conferences (RT 943-944, 948, 969-970). Judge Gardiner also distributed names recommended to him from other non-organization sources (RT 945, 949-952).

Judge Gardiner's personal criteria in selecting grand jurors were to select persons (1) who were fair-minded and intelligent, and (2) who had a commitment to community service (RT 951). He knew personally only eight of the thirty nominees selected. Of these eight, he himself only nominated two (RT 951).

In addition to their personal criteria, Judge Gardiner also pointed out that the judges collectively sought to "spread the selection of grand jurors over the entire county and over each identifiable section of the county" (RT 954:1). They realized that it was impossible to have all elements of the county's 210,000 people represented in a panel of thirty. They nevertheless "tried to get a fair cross-section, old and young, male and female, black and white, rich and poor, people with a knowledge of each area of the county" (RT 956:2-11). Moreover, affirmative efforts were made by the judges to obtain black and labor representation, since members of these groups often indicated that they couldn't afford the time to serve (RT

954-955, 1064).[6] No person was excluded because low income would make it difficult for him to serve. In fact, earnings were not generally a factor in the selection process (RT 1062-1066).

Judge Gardiner himself contacted his "great many black friends" in the county, most of whom declined (RT 954). Judge Gardiner understood the law to be that there could be no systematic or intentional exclusion of an identifiable class of persons (RT 1019-1020). To him this meant the judges should affirmatively seek to ensure that all identifiable groups were represented, but not that they be given representation proportional to their population (RT 1020). However, according to Judge Gardiner, black persons were an exception in that they were proportionately overrepresented on the 1971 panel because of the judge's affirmative efforts (RT 1020, 1031-1032). Judge Gardiner himself had nominated five or six black persons during his eight years as a judge (RT 1091).

With regards to women, Judge Gardiner indicated that the judges estimated the female population of the county at 50 percent (RT 956). Twelve of the thirty nominees, or 40 percent, were women (RT 957).

As regards representation of persons under age 30, Judge Gardiner himself nominated one member of the panel who was in the young adult group (RT 958). He also joined in the selection of another panel mem-

[6]In 1970, for example, a black juror was obtained by the judges when PG&E, the juror's employer, agreed to make his time available without loss of wages (RT 1005-1006).

ber who was both under 30 (RT 964-965) and a member of a student organization (RT 967). Judge Gardiner had personal misgivings about the suitability of the latter nominee, but, nevertheless, joined in the selection because he believed that the young and students, even though of dissident views, should be represented (RT 964, 968, 997).

Judge Gardiner also testified that as far as he knew, the "Chicano" population of the county was very small (RT 1008-1017, 957). He didn't recognize any of the names on the panel of thirty as being "Chicano"[7] (RT 958) and he himself took no affirmative steps to find "Chicano" nominees (RT 1010-1011). Judge Gardiner explained that he did not believe "Chicanos" were an identifiable group in Marin County (RT 1022). Unlike the black community, which resided mainly in Marin City, there is no predominately Mexican-American area in the county (RT 1052-1053, 1082-1083). Rather, the group was largely assimilated or integrated and scattered throughout the county, was very small in number and had no organization in the county as far as Judge Gardiner knew. Judge Gardiner was a longtime resident of the county and had extensive political experience and contacts within the county, but had not come across any "Chicano" organizations (RT 1047-1048). Consequently, for this variety of reasons, he did not consider them

[7]The Court and counsel used the terms "Chicano," "Latino," and Mexican-American interchangeably (RT 1173-1174). Initially, this seemed to be as a matter of convenience (RT 1054-1056, 1269, 1296), but as will be seen, later produced considerable confusion and disagreement.

a cognizable group for purposes of potential grand jury nomination (RT 1027, 1048, 1083, 1086-1087).

Judge E. Warren McGuire:

Judge McGuire has been on the superior court bench since 1968 (RT 1113). Judge McGuire made it clear that 1971 was the first year that the judges solicited suggestions from the civic, social and political organizations in the county, as a means of obtaining a broader distribution and diversity of interests and groups from which to select nominees (RT 1120-1124). Judge McGuire's approach was to try to obtain representation from a broad range of groups by race, sex, age, occupation, etc. (RT 1126, 1134). The judges also consulted the telephone directory to expand the list of organizations (RT 1165). They were consciously making efforts to broaden the membership of the grand jury (RT 1202).

Based upon his knowledge and experience in the county, Judge McGuire did not believe that "Chicanos" were an identifiable group in the county (RT 1168, 1172-1173, 1249). He did not know of any organizations in the county composed primarily of "Chicanos" or which used the word "Chicano," "Mexican" or "Spanish" as part of its title (RT 1215). Similarly, Chinese and Japanese-American citizens were not very numerous and not considered to be "identifiable" for grand jury selection purposes by Judge McGuire (RT 1215-1216).

On the other hand, black citizens were deemed an identifiable group (RT 1215-1217). This was based

upon their numbers and their central location in Marin City (RT 1168, 1170-1171). Judge McGuire stated that geographical concentration would be one factor in determining whether a group was identifiable (RT 1169), but agreed it would not be a necessary pre-condition to identifiability (RT 1172). Affirmative efforts were made to include blacks (RT 1215).

No group was deliberately excluded and no one was excluded because he was under age 30, or because of his low income (RT 1217). In fact, affirmative efforts were made to include younger people (RT 1248) and various economic groups. In determining the economic status of potential nominees, the judges relied on occupation rather than on annual income or net worth (RT 1212-1213). Among the nominees Judge McGuire knew personally, were Manuel Silva, a bus driver, and Mrs. Clayton, a retired county employee (RT 1202, 1212).

Judge Henry J. Broderick:

Judge Broderick has been on the superior court bench since October, 1970 (RT 1255). He, like the other judges, was concerned about obtaining the widest possible diversity of people and points of view (RT 1257). The only racial group for which specific efforts were made to ensure representation was the county's black citizens (RT 1259). No other racial or ethnic group was specially considered (RT 1259). However, Judge Broderick stated that the judges did seek to obtain diverse representation based on age, sex and

geography and to some extent on economic status and education (RT 1259). The selectors' major problem, however, was that wage-earners and students did not have the time to spend on grand jury work. Nevertheless, affirmative efforts were made to ensure that these groups were represented (RT 1260). Judge Broderick pointed out that unwillingness to serve crossed racial and income lines and depended on such factors as devoting time to studies or family (RT 1305-1306).

Judge Broderick believed that youth should be represented on the grand jury because they had a somewhat different point of view than persons in older age groupings (RT 1259-1260, 1263-1267). The judge also pointed out that there was a great diversity of thinking within the younger age group, as well as among older persons, but agreed that the young could be characterized generally as being more liberal (RT 1265). No young person was excluded merely because of age, in fact the young were specifically included (RT 1329).

Judge Broderick also agreed that wage-earners should be represented on juries (RT 1274) and stated that affirmative efforts were made through labor unions to obtain wage-earner representation (RT 1275). No one was excluded by the judges because of poverty (RT 1315-1316) or economic status (RT 1328).

Judge Broderick also stated that he did not think Mexican-Americans were an identifiable group in Marin County (RT 1294). Judge Broderick under-

stood the term "identifiable group" for purposes of grand jury selection to refer to a substantial, significant segment of the community, such as the black citizens of Marin County. He did not believe any other ethnic group was similarly identifiable (RT 1295-1296). This, he explained, did not mean that other ethnic groups were excluded or had no opportunity to be considered. To the contrary, Judge Broderick pointed out that the selection process was designed to obtain a broad cross-section of diverse community groups regardless of whether they knew of any particular identifiable group (RT 1299-1301, 1322:27).

Judge Keating:

It was stipulated that Judge Keating's testimony would be cumulative of the other judges and that he would not be called as a witness (RT 1331-1332).

Judge Joseph Wilson:

Judge Wilson has been a Marin Superior Court Judge since 1965 (RT 1337). Together with his colleagues, he sought to select grand jurors who would represent a broad cross-section of interests and groups, in terms of age, sex, geography and occupation (RT 1350, 1434-1435). Special affirmative efforts were also made to ensure that there were black citizens on the panel (RT 1350). In fact, two blacks were on the 1971 member panel (RT 1378-1379). Judge Wilson himself sought to obtain representatives from both conservationist and commercial interests (RT 1350). He did not, however, suggest any

personal nominations of his own acquaintance (RT 1349).

No one was systematically excluded because of age (RT 1411), occupation (RT 1412) or low income (RT 1418). Indeed, the judges made a conscious effort to include young people under age 29 and students (RT 1344). Two College of Marin students, Beban and Reed, were selected (RT 1345-1346). At least four other persons under age 35 were considered (RT 1411).

To obtain wage earner or blue-collar worker representation no special efforts were made other than to solicit suggestions from local labor organizations (RT 1346-1348).

Judge Wilson considered blacks to be an identifiable group in Marin County for purposes of grand jury service (RT 1373). He knew that the black population of the county was between 2 and 3 percent (RT 1409)[8] but found that their geographical concentration in one area of the county (Marin City) was a factor in determining identifiability (RT 1377-1379). Another factor was Judge Wilson's belief that black citizens had a wide variety of common goals and interests (RT 1373, 1385), including several organizations (NAACP, CORE) (RT 1409). A third factor was the history of visible discrimination against blacks, notably in housing and jobs (RT 1424-1425).

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[8]The judges did not use the 1970 census figures when they were selecting the 1971 grand jury during the period from October, 1970 to April, 1971 (RT 1367-1368). The census was not issued until after October, 1971, and hence, was not available to the judges.

On the other hand, Judge Wilson did not believe that Mexican-Americans were an identifiable group in Marin County (RT 1366-1367, 1372-1373). Judge Wilson knew there were people with Spanish surnames in Marin County, but did not think they were very numerous (RT 1350-1351). Neither did he believe that there had been blatant, visible discrimination against Mexican-Americans in Marin County (RT 1413-1416). Unlike blacks, persons of Spanish surname, according to Judge Wilson, cover a fairly broad diversity of interests and concerns (RT 1373). Neither were Spanish surnamed persons geographically concentrated in the county (RT 1373). Judge Wilson, who like the other judges, had lived in Marin County for some twenty years, and was active politically, had not come across a single organization or club which was identifiable as a Spanish surname group by membership or title (RT 1408).[9] For these reasons, unlike black citizens, he did consider the Mexican-American or Spanish surname group identifiable for grand jury selection purposes.

C. The Population and the Panel Compared.

The trial court took judicial notice of, or admitted into evidence, pertinent portions of the 1970 federal census relative to the makeup of the Marin County population (RT 1426-1430, 1437-1438, 1467, 1577,

[9]Defense witnesses conceded that the largest "Chicano" organization in the county in 1973 was La Familia with only 100 members (RT 1915). That group was not in existence when the 1971 panel was selected, having been organized in mid-1971 with some twelve members (RT 1897, 1913, 1967). There was no "Chicano" or La Raza group at College of Marin in 1971 (RT 1916-1917).

1613). Also in evidence was a survey of the age, occupation, race and income profile of the 30 persons selected for the 1971 grand jury panel (Peo. Exh. E, RT 2520). Using the actual data revealed by the census and the survey, simple mathematical calculations were made to determine the population percentages of the four groups allegedly excluded, as compared to their representation on the 1971 grand jury panel, as follows:

(1) Black Citizens:

The 1970 population of Marin County was 206,038,[10] of whom 5,042[11] or 2.4% were black citizens.

Two of the 30 persons on the 1971 panel or 6.7% were black (RT 1275, 1379, 1570).

(2) Young Adults (age 21-29):

According to the census, there were 131,312 persons[12] in Marin County, age 21 or over. Of these, 28,919[13] or 22.0% were age 21-29.

Two of the 30 panel members (Messrs. Beban and Graves), or 6.7 percent, were age 29 or under when they were selected (RT 2510, Def. Exh. 2, RT 852, 871, CT 239).

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[10]1970 Census (California) p. 6-1034. Hereafter, all census references are to the census for California, unless otherwise indicated.

[11]1970 Census, p. 6-310.

[12]1970 Census, p. 6-318.

[13]1970 Census, p. 6-318. To obtain the correct figure for age 21-29, we added the figures for age 20-24 and age 25-29 and then subtracted the figure for age 20.

(3) Low Wage Blue-Collar Workers:

(a) Blue-Collar:

From the evidence in the record, the composition of the class "low wage blue-collar workers" is not at all clear. The trial court made no express findings defining the group, but simply utilized that label. Both defense and prosecution sociologists testified (RT 1667-1668, 2070) that blue-collar workers can, as a general proposition, include the following occupations listed in the census for Marin County:

Crafstmen (including foremen	7,229
Operatives	4,382
Transport Operatives	1,573
Laborers	2,400
Farm	371
Service	8,160
	24,115

White collar workers include the following occupations:

Professional, technical	19,598
Managers	12,010
Sales	9,247
Clerical	15,945
	56,780

(RT 1667-1668, 2070).[14]

However, the median annual earnings of the blue-collar craftsmen group ($10,100.00) is closer to the income of the white-collar professional-managerial class ($14,100.00) than to blue-collar laborers and opera-

[14]1970 Census, p. 6-1049.

tives ($4,500.00-$7,400.00). On the other hand, white-collar clerical workers had median earnings of only $5,200.00.[15]

The total number of persons age 16 or over employed in Marin County is 80,620.[16] The blue-collar groups listed above total 24,115 or 29.9% of the total. Since the census uses age 16 and over in analyzing these occupations, correction for age 16-20 is necessary since the grand juror eligibility age is 21. An expert witness estimated that such a correction would disclose that 25% of the county's employed population over age 21 fell into the above listed blue-collar occupations (RT 2090-2092). This figure seems not to be in dispute (RT 2164-2165).

On the panel, it would appear that three of the 30 members of the panel, or ten percent, fell within the blue-collar occupations listed in the census. We refer to Mr. Silva, a bus driver, Mr. Tibbott, a retired printer and Mr. DeVore, a supervisor at Western Electric Company, hence a foreman within the craft blue-collar group (Peo. Exh. E).[17] However, the record states that 17 of the 30 members of the panel were employed (RT 2094-2097). Thus, the 3 blue-collar members constitute about 17.6% of the employed panel members compared to 25% blue-collar in the over 21 employed population.

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[15]1970 Census, p. 6-1049 bottom.

[16]1970 Census, p. 6-1049 top.

[17]Petitioners claim that the record shows that there was only one blue-collar worker on the panel, the bus driver Mr. Silva (Pet. 10).

(b) Low Income:

If income rather than occupation is looked to as the more relevant and more precise means of defining the economic class, the record discloses that six, or 20%, of the 30 panel members reported annual family incomes of less than $9,000.00 (RT 2510-2511, 2517, 2520, Peo. Exh. E). The census shows that of Marin County's 51,912 families, 12,664, or 24 percent, had incomes of $9,000.00 or less.[18]

(4) Latin Americans:

The census contains no population data for such groups as Latin Americans, Latinos, Chicanos or Mexican Americans. For California, census figures are presented for persons of Spanish language and all *other* persons of Spanish surname. Of Marin County's 206,038 persons, 8,530, or 4.1 percent are "Persons of Spanish language", and 3,491, or 1.7 percent, are in the group "Other persons of Spanish surname".[19]

The petitioners' claim of discrimination is based on their assumption that the total of the "Spanish language" and "Other Spanish surname" groups, 12,021 persons, or 5.8 per cent of the county population, is the number of "Chicanos" or "Latin Americans" in the county. That assumption was never factually established. There was no evidence presented either in the

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[18] 1970 Census, p. 6-1059.

[19] 1970 Census, p. 6-1034. As defined by the census, "Persons of Spanish language comprise persons of Spanish mother tongue and all other persons in families in which the head or wife reported Spanish as his or her mother tongue." 1970 Census, App. p. 10. "[P]ersons with Spanish surnames were identified by means of a list of over 8,000 Spanish surnames originally compiled by the Immigration and Naturalization service." 1970 Census, App. p. 10.

form of census definitions or by way of expert testimony from a sociologist that all persons of the Spanish language and other Spanish surname groups were Chicanos.[20]

Mindful of this omission, counsel for petitioner Talamantez, the only Mexican-American among petitioners, was permitted to reopen his case eight days after the close of the evidentiary hearing to present additional evidence. Ms. Theller, a social worker for a local anti-poverty agency, testified that "Chicanos" and Mexican-Americans were considered one and the same by her agency (RT 2745-2746). She also indicated initially that many of the approximately 8,000 Spanish language persons in the county were "Chicanos" or Mexican-Americans (RT 2746-2750). However, she subsequently admitted that her definition of "Chicano" also included persons born in Central America (RT 2746-2747). Upon cross-examination, Ms. Theller could verify only that an estimated 3,000 of the 8,000 Spanish language persons were actually Mexican-Americans (RT 2750). She also conceded that she had no knowledge of the national origin or heritage of any of the other 5,000 or so Spanish language persons in the county, that they could be from Spain, or any other country, rather than of Mexican heritage (RT 2752). At least one of the petitioners accepts 3,000 as the number of Mexican-Americans in Marin County (CT 262:29). This is only 1.5% of the population.

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[20]We point out, for example, that under the census, if the head of household is either Spanish surname or Spanish language, the entire family is so counted even though the spouse and children may not themselves be within that group.

Further, there is expert testimony of sociologist Scott that in the San Francisco Bay Area which includes Marin County, a Spanish surname was not a very reliable guide to "Chicano" origins (RT 2243-2244, 2478). Other groups in this area, particularly Filipinos (RT 2478), and Portuguese (RT 2614), bear surnames which appear on the census list of "Spanish" surnames. Doctor Scott defined "Chicano" as a person who was born or whose parents were born in Mexico (RT 2138). He stated that, unlike the Bay Area, most Spanish surnamed persons in the central valley area of California were "Chicano" (RT 2276). Doctor Scott's observations regarding Mexican-Americans appear to be uncontradicted.

Dr. Scott's opinion is supported by the census. In the separate 1970 census volume entitled *Persons of Spanish Origin* (i.e. persons who report their place of origin or descent as either Mexico, Cuba, Puerto Rico, Central America, South America, or other Spanish), the Fresno metropolitan area [a central valley locale] listed 93,502 persons of Spanish origin, of whom 86,135 (or 92%) were of Mexican origin. By contrast, the San Francisco-Oakland metropolitan region which includes Marin County listed 231,453 persons of Spanish origin of whom only 118,056 (or 51%) were of Mexican descent.[21]

We point out also that the 3,491 persons in the class "Other Persons of Spanish surname" are persons who are not within the Spanish language (or mother

[21] 1970 Census (Span. Orig.) p. 154.

(tongue) group. This may well reflect those persons of Portuguese descent who reside in Marin County whose surnames (e.g. Silva) appear on the census list of "Spanish" surnames. Unfortunately, the 1970 census contains no data for persons of Portuguese origin. However, the 1960 census does contain such data, at least as to persons of foreign stock. In 1960, 1,305 persons in Marin County are listed as being of Portuguese stock, only 1,218 are listed as being of Mexican stock.[23] The 1970 census shows 1,366 persons of foreign stock from Mexico in Marin County.[23] By interpolation for 1970, it may well be that Portuguese stock persons outnumber persons of Mexican stock. This supports our view that the Spanish surname group in Marin County may well be predominantly Portuguese, not Mexican-American.

Neither does the census show that all of the 8,530 Spanish language persons have Spanish surnames. Indeed, the very opposite is true—nearly ⅔ (5,682) of the Spanish language group do not have Spanish surnames. Only 2,848 Spanish language persons in Marin County have Spanish surnames.[24] These facts bespeak a substantial degree of intermarriage, assimilation and integration among Marin County's group of "Spanish language" residents.

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[22]1960 Census (California), p. 6-447.

[23]1970 Census, p. 6-1034.

[24]Our data is based on the 1970 census separate volume entitled, *Persons of Spanish Surname* (p. 117) which reveals that there are 6,339 persons (3.1%) with Spanish surnames in Marin County. Since 3,491 of these are in the general census category, "other persons of Spanish surname", the remainder, only 2,848, must be Spanish language.

To further illustrate the problem of identifiability, we note that yet another census category "Persons of Spanish origin" reveals that there are 5,781 such persons in Marin County, or 2.8% of the total population.[25] But this category is by definition over-inclusive in that it covers persons whose origins are as diverse as Mexico, Cuba, Puerto Rico, Central and South America and other Spanish areas.

As for representation on the 1971 grand jury panel, it is conceded that there were no "Chicanos" selected (RT 2625). But, it is also undisputed that three of the thirty persons, or 10%, on the panel had surnames which appeared on the census list of Spanish surnames (Peo. Exh. F; RT 2598): Mr. Silva, Mr. Raab and Mr. Marcus (RT 2593, 2615-2622).[26] As previously noted there are 6,339 Spanish surnamed persons in Marin County (1970 census, Spanish surnames) or 3.1%.

The People offered to prove that two of the thirty-member panel, or 6.7%, were Spanish language: Mrs. LaBelle and Mr. Dolan (RT 2770; CT 232-233, RT 2761-2768).[27] The trial court refused to admit the People's proffered evidence (RT 2768-2769), stating:

> "I hope the appellate court doesn't send it back because we didn't take this testimony" (RT 2769: 7-8).

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[25]1970 Census, p. 1034.

[26]Parenthetically, it seems that Mr. Marcus' father was born in Spain (CT 232-233) and that the name Silva is Portuguese (RT 2595, 2614).

[27]Dolan's wife and children speak Spanish. She was born in Bogota, Columbia. Mrs. LaBelle's father was born in El Salvador. Spanish was spoken in her home (CT 232-233).

The census lists the Spanish language population of the county at approximately 8,530 or about 4.1 percent.

D. Prior Grand Jury Panels (1962-1970).

Except for a presentation of a list of the 211 names of the persons who were on the grand jury panels from 1962 to 1970 (RT 2522-2525; Def. Exh. 39), the petitioners introduced no material evidence of the composition of such prior panels or any comparative population data for prior years. When the People attempted to introduce evidence from prior years petitioners objected and the trial court, we believe, erroneously refused to admit it (RT 900-901).

If evidence of prior years had been admitted, the prosecution would have been able to show that blacks have been fairly represented on all Marin County panels since 1962. Such evidence was admitted without objection in the case of *People v. Angela Y. Davis,* No. 3744 in the files of Marin County Superior Court. We ask this Court to take judicial notice thereof. Cal. Evid. Code § 459. (See, Declaration of Edmar D. Hicks attached hereto as Appendix A). The affidavit shows that since 1962, blacks have comprised 5.5% of those selected for grand jury service; as compared to only 2.5% of the Marin County population. This is neither exclusion nor tokenism—it is fair and often over representation.

Moreover, when the census list of 8,000 Spanish surnames is compared to the defense list of names on

the 1962-1970 panels, eight names[28] or 3.8% are Spanish surname. According to the 1960 census, the Spanish surname population of Marin County was 5,634 or 3.8% (1960 census, Vol. II, p. 195).

E. Defendants' Standing.

Defendants Spain, Tate, Drumgo and Johnson are black Americans (RT 1641, 2568, 2530, 2550). Mr. Talamantez is Mexican-American (RT 1974).[29] Mr. Pinell is a black and brown citizen of Nicaragua (RT 1862-1864). The defendants are all age 30 or below

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[28]The names are: Barbier, Oram, Vargas, Marcus, Cassa, Barron, Ferrarese, and Silva.

[29]In California, "it is . . . an essential part of the challenges to the panel, that a defendant bring himself . . . within the class concerning which he is complaining." *Ganz v. Justice Court*, 273 Cal. App.2d 612, 620 (1969). *Accord, People v. White*, 43 Cal.2d 740, 753 (1954); *People v. Schader*, 71 Cal.2d 761, 784 (1969). *In re Wells*, 20 Cal.App.3d 640, 649 (1971).

If the accused cannot show membership in the excluded class, he must show prejudice directly resulting from the asserted discrimination. *People v. Sirhan*, 7 Cal.3d 710, 753 (1972); *Allen v. State*, 137 S.E.2d 711 (Ga. Ct. App. 1964).

> "[I]f the defendant is a member of the class excluded the danger of prejudice is great enough so that we will condemn the exclusion without looking for actual prejudice; but if he is not a member of the excluded . . . class the danger is not great, and before we will condemn the exclusion . . . we must find that the defendants were actually prejudiced." SCOTT, *The Supreme Court's Control Over State and Federal Juries*, 34 Iowa L.Rev. 577, 584 (1949).

All defendants, except Talamantez, a "Chicano," are black persons. No evidence of actual prejudice was offered. Hence, the black defendants cannot assert discrimination against "Chicanos," and Talamantez cannot assert bias against blacks. This defect in proof is not cured by the holding of *Peters v. Kiff*, 407 U.S. 493 (1972): an accused need not show standing to assert race discrimination in the selection of grand or petit jurors. *Id.* at 504, 507. *Peters v. Kiff* governs criminal proceedings "instituted" after June 22, 1972, the date of that decision. *People v. Sirhan, supra*, 7 Cal.3d at 754. Since defendants were indicted on October 1, 1971, the unabridged standing requirement forecloses their claims with respect to the exclusion of persons or groups other than their own.

(RT 1623, 2567, 1862, 2549, 2529, 1947). All are felons and prison inmates with low or no income.

ARGUMENT

THERE WAS NO EVIDENCE OF DELIBERATE DISCRIMINATION AND THE UNDISPUTED EVIDENCE SHOWS THAT THE 1971 MARIN COUNTY GRAND JURY PANEL WAS COMPOSED OF A FAIR CROSS-SECTION OF THE COUNTY SELECTED BY THE SUPERIOR COURT JUDGES WHO DID MORE THAN THE FOURTEENTH AMENDMENT REQUIRED BY MAKING AFFIRMATIVE EFFORTS TO ENSURE FAIR REPRESENTATION FOR ALL COGNIZABLE GROUPS IN THE COUNTY.

It is settled law that a criminal conviction cannot stand under the Equal Protection Clause of the Fourteenth Amendment if it is based on an indictment of a grand jury which has been selected in a manner which deliberately and systematically discriminates against any citizen by reason of his race, national origin, sex or other constitutionally cognizable status. *Alexander v. Louisiana,* 405 U.S. 625, 628-629 (1972); *also see Hernandez v. Texas,* 347 U.S. 475 (1954); *Hoyt v. Florida,* 368 U.S. 57 (1961); *Swain v. Alabama,* 380 U.S. 202, 203-205, 209 (1965). However, "[N]either the jury roll nor the venire need be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group." *Swain v. Alabama, supra,* 380 U.S. at 208. "A jury system exactly reflecting the black-white population of a community could be helter-skelter on the basis of economic, educational, social and job status." *United States v. Hyde,* 448 F.2d 815, 825-826 (5th Cir. 1971); *accord Fay v. New York,* 332 U.S. 261, 284-286, 291 (1946).

Moreover, systematic discrimination must be shown to have existed over "an extended period of time." *Hernandez v. Texas*, 347 U.S. 475, 480 (1954); *Swain v. Alabama, supra*, 380 U.S. at 227. Here, the petitioners presented no evidence regarding prior years.

"[P]urposeful discrimination may not be assumed or merely asserted . . . . It must be proven." *Swain v. Alabama, supra*, 380 U.S. at 205. "The burden of proof is on the defendants to establish a prima facie case of invidious discrimination." *Whitus v. Georgia*, 385 U.S. 545, 550 (1967); *Hernandez v. Texas, supra*, 347 U.S. at 480.

Here, the defendants did not carry this burden of proof. Deliberate discrimination was neither alleged nor shown either in the form of total exclusion or token limitation on the part of the selectors. *Cf. Cassell v. Texas*, 339 U.S. 282 (1950). Rather, petitioners rely solely on an allegation of statistical underrepresentation for a single year.

Of course, the omission by the petitioners of data from prior years is not surprising. By means of judicial notice of Appendix A, it will be apparent to this Court that one of the groups found discriminated against, namely Marin County's black citizens, have in fact been fairly represented or overrepresented on every grand jury panel since 1962.

Moreover, the testimony of all of the judges, called as witnesses for the defense constitutes positive, undisputed proof that no deliberate discrimination was practiced against any person or group by reason of

race (RT 1350), age (RT 1251, 1329, 1411), poverty, income or economic status (RT 1062-1066, 1217, 1315-1316, 1328, 1418) or ethnic background (RT 1217, 1299-1301). The judges thus denied deliberate discrimination and that denial is undisputed.

We submit, therefore, that this testimony alone justifies denial of certiorari. For, while it may be true that conclusionary affirmations of good faith and denials of deliberate discrimination are insufficient *alone* to dispel or explain a prima facie case of systematic deliberate discrimination *(Turner v. Fouche,* 396 U.S. 346, 360-361 [1970], that principle is not applicable here for two reasons.

First, no prima facie case of discrimination against blacks, blue-collar workers or young adults was determined to have been established at the hearing (RT 2603). Hence, the burden had not shifted to the selectors to explain or dispel; no discrimination having been found. See, *e.g., United States v. Hyde, supra,* 448 F.2d at 825-826. The trial court ultimately ruled as to these groups without allowing the people to present evidence, an error which was corrected by the reversal on appeal.

Second, and more significantly, the selectors' testimony was not merely conclusionary affirmations of non-discrimination. The judge's testimony presented a detailed description of their selection practices, their mental processes and understanding of their duties, which was exhaustively examined by counsel for all parties. That testimony constitutes undisputed evidence negating any inference of deliberate exclusion

for not only was deliberate exclusion denied, there was in fact affirmative action to include persons from all cognizable groups in the county.

Specifically, the testimony of the judges is that they made affirmative efforts, individually and collectively, to obtain "a fair cross-section, old and young, male and female, black and white, rich and poor, people with a knowledge of each area of the county" (RT 956:2-11 [Gardiner, J.]; *accord,* RT 1126, 1134 [McGuire, J.], RT 1259 [Broderick, J.]; RT 1350, 1434-1435 [Wilson, J.]. To the judges this meant that they should seek to obtain representation from the various cognizable groups in the county, but not to provide proportional representation (RT 1020, 1260). According to the judges' undisputed testimony affirmative efforts were made to insure fair representation from labor (RT 954-995), wage-earners (RT 1064, 1260, 1274, 1275), women (RT 964), young persons, including students (RT 964, 1260, 1344), conservation groups (RT 1350) and the black community (RT 954-955, 1346-1348, 1350).

The record thus supports a conclusion: (1) that the means used by the selectors were designed to insure fair representation of all cognizable groups, and (2) that the selectors went beyond their own wide circle of friends and personal acquaintances and solicited suggestions from numerous community groups and individuals in order to insure a broader cross-section (CT 73-74). Further, the composition of the panel compared to the eligible population of the county reveals that the judges' efforts were largely

successful or provide a constitutionally acceptable explanation for any disparity as follows:

1. Black Persons.

First, there were two black persons on the panel of thirty in 1971. This is 6.7%. The black population of the county is only 2.4%. Hence, as several of the judges pointed out, blacks were overrepresented in 1971 (RT 1020, 1031-1032) as was true in the previous nine years. Petitioners state that the two blacks on the 1971 panel had incomes higher than that of the average black citizen. They omit evidence from past years that the judges made arrangements with a black wage-earner's employer to obtain his services on the grand jury (RT 1005-1006). In any event, petitioners have no right to a panel "tailored" to their own circumstances. *Hoyt v. Florida, supra,* 368 U.S. at 59; *People v. Newton,* 87 Cal.Rptr. 394 [8 Cal.App.3d 359, 390-391] (1970).

2. Persons with Spanish Surnames; Spanish Language Persons; Mexican-Americans; Latin Americans.

All of the judges candidly testified that they did not consider Mexican-Americans or "Chicanos" to be a constitutionally cognizable group in Marin County for purposes of grand jury representation (RT 1047-1048, 1167, 1972, 1249, 1294, 1367, 1407-1408). In essence, they all were of the view that Mexican-Americans were not sufficiently numerous or otherwise identifiable in 1971, there being no geographic concentration of Mexican-Americans in the county (RT 1013-1016), no Mexican-American organizations in the county (RT

1215, 1408-1409), and no outward, visible manifestation of discrimination against Mexican-Americans (RT 1412-1416). All of the judges based their views on their longstanding residence in the county and the broad knowledge thereof developed in the course of their participation in legal and political affairs (RT 1013-1016, 1299-1300, 1168, 1172-1174, 1408).

It is true, however, that several non-expert witnesses for the defense testified in conclusionary terms that "Mexican-Americans or Chicanos" were an identifiable group in Marin County (RT 1897, 1961, 1981, 1995-1998). Their testimony was based on their assumption that the 12,000 Spanish language plus other Spanish surnamed persons in the county were "Chicanos", an assumption which was never proven. The defense witnesses were not experts in sociology, demography or statistics. They were primarily lay persons of Mexican-American heritage. Their testimony displayed a certain lack of knowledge of the facts underlying their conclusion. For example, Mrs. Hicks, who had been in Marin County for less than a year (RT 1962:21-22), believed that most members of the "identifiable" group were blue-collar workers (RT 1969-1970) whose average annual income was between $5,000 and $6,000 (RT 1977). Yet, census shows that Marin's Spanish language-surname group was mostly white-collar whose average income was $13,826 (1970 census, p. 6-1096; RT 2002, 2026-2028). Neither Mr. Gallardo nor Ms. Wallace could supply evidence of specific instances of job or housing discrimination in Marin County (RT 1903, 1927-1929, 2002-2003, 2021-2028).

Mr. Gallardo and Ms. Estrada conceded that many Mexican-Americans in the county had assimilated into the general population (RT 1922-1924, 1981, 2000). These same witnesses also confirmed the judges' testimony that in 1970-1971 when the panel was selected, there were no Mexican-American organizations in Marin County (RT 1913-1916), that Mexican-Americans were not geographically concentrated (RT 1907) and not a visible minority (RT 1965, 2004). This is consistent with the testimony of the judges that they did not consider "Chicanos" an identifiable group in Marin County.

In any event, evidence was introduced that three of the thirty panel members had surnames which are classified as Spanish surnames by the 1970 census (RT 2614-2620). This is 10 percent. According to the census, some 6,339 Marin residents are classified as persons of Spanish surnames. This is only 3.1%. Hence, by this undisputed evidence, we would submit that persons of Spanish surname were more than fairly represented.

There are some 8,000 Spanish language persons in Marin County. One non-expert witness estimated that 3,000 of these were Mexican-American (RT 2750-2751). This is the only evidence as to the number of Mexican-Americans in Marin County (RT 2618:21-29). Since it is only an estimate its accuracy is questionable. The actual figure could well be considerably lower. However, since it is undisputed we accept it. Thus, Spanish language persons constitute about 4.1 percent of the county population and Mexican-

Americans constitute only 1.5 percent of the county population. The prosecution offered to prove that two of the thirty panel members in 1971, or 6.7% fell within the Spanish language category defined by the census (RT 2770, 2761-2768; CT 232-233). The trial court ruled that the People would not be able to present this evidence (RT 2768-2770:12). The Court ruled that the hearing had been reconvened only to allow the defense to reopen its case (RT 2768-2769:2, 2738:17-21) and cryptically remarked:

> "I hope the appellate court doesn't send it back because we didn't take this testimony."
> (RT 2769:7).

Petitioners have not, however, challenged the truth of the offer. If it is accepted as true, then Spanish language residents of Marin County were more than fairly represented on the panel (6.7% panel: 4.1% population). At all events, there was no evidence presented nor have petitioners alleged that Spanish language persons, as such, were a distinct, constitutionally cognizable group (CT 206, 262, 278-279, 287-288). Indeed, defense witness Theller conceded that the Spanish language group included persons from the Philippines (RT 2749:2), Spain (RT 2752:11) or from any other country (RT 2752). It will also be recalled that 5,682 of Marin's 8,530 Spanish language residents do not have Spanish surnames.

As regards Mexican-Americans (or Chicanos), the undisputed evidence shows that this group, which consists of no more than 3,000 persons (or 1.5%), is not sufficiently numerous in Marin County to be con-

sidered constitutionally cognizable for grand jury service. As a proportional matter, the group would be entitled to less than one-half of one person representation on a panel of thirty. We submit that the conceded absence (RT 2625) of such a small group in a single year is of no constitutional significance. See, *United States v. Whitley,* 491 F.2d 1248, 1249 (8th Cir. 1974); *Smith v. Yeager,* 465 F.2d 272, 279 n. 18 (3rd Cir. 1972); *see also, Swain v. Alabama, supra.*

3. Young Adults (age 21-29).

It is the People's position that age group 21-29 is not a constitutionally cognizable class. Nearly all federal courts have refused to impose age standards upon grand jury selectors. For, unlike racial discrimination, age discrimination does not forever exclude any citizen from grand jury service. In a recent decision, the District of Columbia Circuit states:

> "With the exception of *United States v. Butera,* 420 F.2d 564 (1st Cir. 1970), all federal courts, both at the trial level and at the circuit level, have held that the category of 'young persons' is not a cognizable class that must be systematically mirrored in jury selection procedures." *United States v. Greene,* 489 F.2d 1145, 1149 (D.C. Cir. 1973).

Accord, United States ex rel. Chestnut v. Criminal Court of City of New York, 442 F.2d 611 (2nd Cir. 1971) [approving a minimum age requirement of 35 years]; *United States v. Guzman,* 337 F.Supp. 140 (S.D.N.Y. (1972), *affirmed,* 468 F.2d 1245, 1247 (2nd

Cir. 1973); *United States v. DiTommaso*, 405 F.2d 385, 391 (4th Cir. 1968); *United States v. Kuhn*, 441 F.2d 179, 181 (5th Cir. 1971); *United States v. Gargan*, 314 F.Supp. 414, 417 (W.D. Wis. 1970), *affirmed sub. nom. United States v. Gast*, 457 F.2d 141 (7th Cir. 1972); *United States v. Ross*, 468 F.2d 1213 (9th Cir. 1973).

Moreover, even the First Circuit has retreated somewhat from its position in *Butera*. See, *United States v. Camara*, 451 F.2d 1122, 1125-1126 (1st Cir. 1971).

Expert testimony (including that provided herein)[30] regarding the "generation gap," or the "condition of youth" is "little more than an elaborately developed statement of the obvious." *United States v. Gargan, supra*, 314 F.Supp. at 416-417. The testimony herein did not, as it must, show that "with specific reference to the function of a grand jury, the age group . . . is . . . an identifiable class." *Ibid. Accord, United States v. Ross, supra*, 468 F.2d at 217 (rejecting expert testimony as unpersuasive).

> "Classification of persons on a decennial age basis may well be significant for certain purposes, but it is certainly not required as as underlying jury selector principle." *United States v. Cohen,*

[30]Defense sociologist Doctor Blauner testified that young adults shared a liberal outlook or point of view not in common with older persons (RT 1661-1665). Doctor Scott disagreed, stating that while young people had shared attitudes regarding specific issues pertinent to them (the draft, auto insurance, legalizing marijuana, etc.), they did not share such a common outlook regarding the primary functions of the grand jury (RT 2058-2061, 2068, 2117-2120, 2417-2418, 2422). Doctor Blauner did agree that there were many issues upon which the young were divided (RT 1662).

275 F.Supp. 724, 740 (D.Md. 1967); *affirmed sub. nom. United States v. DiTommaso, supra.*

> "We regard it as highly speculative whether the decisional outlook of such excluded persons would be different than that of persons a few years older, or a few years younger." *King v. United States,* 346 F.2d 123, 124 (1st Cir. 1965).

In *Butera,* age group 21-34 was recognized as the young adult class. This was not, however, a constitutional principle. The First Circuit avowedly exercised its supervisory powers over inferior federal courts to impose a requirement more rigorous than demanded by the Constitution. 402 F.2d at 567, n. 2, 568, n. 7, 570. Yet, two days before *Butera* was decided, this Court held in *Carter v. Jury Commission,* 396 U.S. 320 (1970):

> "It has long been accepted that the Constitution does not forbid the states to prescribe relevant qualifications for their jurors. The states remain free to confine the selection . . . to persons meeting specified qualifications of *age* and educational *attainment* . . . ." 396 U.S. at 332.

Approval was noted of state statutes requiring jurors to be age 25. *Id.* at 333, n. 29.

Although in the printed reports *Butera* cites *Carter* (420 F.2d at 567, n. 5), the First Circuit original slip opinion contains no reference to *Carter.* This fact may well explain the basic inconsistency in the two opinions. We submit that *Carter,* not *Butera,* controls here. The young are not a cognizable group as a matter of constitutional law.

In any event, even if young adults, age 21 to 29, are assumed, *arguendo*, to be a cognizable group, the record does not reveal any deliberate discrimination against persons of that group. Indeed, deliberate discrimination against the young is not alleged. As long as there is no deliberate exclusion, underrepresentation of young adults does not violate the Constitution. *Hamling v. United States, supra,* 418 U.S. 137-138; *United States v. Greene, supra; United States v. Gargan, supra; United States v. DiTommaso, supra.*

But that is not all. The record reveals that the selectors made affirmative efforts to obtain representation of young adults including students for the panel. They were successful in finding and selecting Mr. Beban, age 23, a College of Marin student, and Mr. Graves, age 29 (RT 1575-1576; Def. Exh. 2; RT 2520; Peo. Exh. E). This is about 7 percent of the panel. It is true that 22 percent of the over age 21 eligible population in Marin are age 21-29.[31] There is,

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[31]The petitioners offered the testimony of Doctor Sperlich, an expert in probability or statistical decision theory (RT 1766). See, FINKELSTEIN, *"The Application of Statistical Decision Theory to Jury Discrimination Cases,"* 80 Harv. L.R. 338 (1966). As to youth, for example, Sperlich found that only in six chances in 1,000 would a panel of thirty nominees have only two members in age group 18-29 if selected at random (RT 1770, 1776, 1802). To Doctor Sperlich a result of one chance in 100 would not have been statistically significant to show discrimination (RT 1775, 1804-1805). Since his result was six in 100, it was his opinion that the selection process was not random (RT 1826-1827) and biased against youth (RT 1776:5). However, in 1971, 18-20 year olds were not eligible by statute. Pen. Code § 893. Hence, Doctor Sperlich's calculation is of no probative value (RT 1789, 1803). The People's expert, Doctor Scott, did compute the probability of two of thirty on the panel in age group 21-29 and found the random chance of such a result is greater than one in 100, and, hence, not statistically significant to show bias according to Doctor Sperlich (RT 1775;

moreover, a constitutionally acceptable explanation for this disparity, which is not only common knowledge and judicially noticeable, but was also so testified to by the judges herein. Namely, many young men are unable or unwilling to serve due to the demands of military service, college studies and family obligations and many young women are in school or at home caring for infants. *United States v. DiTommaso, supra; United States v. Butera, supra.* Indeed, the disparity was much greater in *Butera* (65 in pool, 238 if proportional, or almost a 4:1 disparity) and similar explanations were found acceptable. In this case, we doubt that such explanation is even required since the judges undisputedly made affirmative efforts to include the young. Such evidence negates discrimination as a matter of law.

4. Low Wage Blue-Collar Workers.

From the testimony presented, the makeup of the group "low wage blue-collar workers" is not at all clear. No findings thereon were made by the trial court. It seems to include a rather well-paid group of craftsmen; but does not include clerical workers, a relatively lower paid group, mostly female, which is considered white-collar.

Doctor Blauner testified generally that blue-collar workers comprised a group which shared common at-

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1804-1805). In any event, though probability theory may show whether a panel has been selected randomly or not, it does not determine whether there has been bias in the selection process. The courts have uniformly rejected efforts such as Doctor Sperlich's to equate a non-random procedure with discrimination. See, *e.g., Stephens v. Cox*, 449 F.2d 657, 660 n. 8 (4th Cir. 1971); *cf, Carter v. Jury Commission, supra.*

titudes (RT 1669-1670). However, Doctor Scott pointed out that the attitudes of blue-collar workers varied primarily with their income and also their particular trade (RT 1711, 2075-2077). Both agreed that the blue-collar group tended to be more conservative on civil liberties issues than white-collar groups, while the latter tended to be the more conservative on economic issues (RT 1744-1746, 2079, 2108, 2111, 2121-2122, 2350). No showing was made that this group shared a common outlook with respect to the functions of the grand jury. Since the group is overinclusive in terms of income and occupation, we doubt any such showing could be made. We submit therefore that low wage blue-collar workers are not a cognizable class for grand jury service. *Quadra v. Superior Court, supra,* 378 F.Supp. at 621.

In any event, blue-collar workers were fairly represented on the panel. As noted, 25 percent of Marin County's 80,000 employed persons over age 21 are "blue-collar". Seventeen of the thirty members of the panel are employed.[32] If blue-collar workers were proportionally represented they would thus be entitled to four members. In fact, there were three: Mr. Silva, a bus driver, Mr. Tibbott, a printer, and Mr. DeVore, a supervising electrician.[33]

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[32]Since the total over age 21 Marin County population is about 130,000, of whom 80,000 or 60 percent are employed, [1970 census, p. 6-318, 6-1049] the fact that seventeen of the panel of thirty or 57 percent are employed, is just about right.

[33]Dr. Sperlich's probability theory calculations as to blue-collar workers was based on only one such person being on the panel of 30 (RT 1777). There were three. He found only a 5 in 100 million chance of their being 1 in 30. However, his population figures were

In the absence of deliberate exclusion, such substantial representation suffices. *Cf., Fay v. New York, supra.* No showing as to prior years was made. Moreover, the judges all testified that they did not discriminate on the basis of occupation or economic status, but rather affirmatively sought to obtain broad representation of various occupations. Moreover, there was a constitutionally acceptable explanation for the disparity. Namely, obligations of family support and time on the job made members of such groups proportionately more unwilling or unavailable to serve.

It is more significant, however, to look at income groupings since these can be more precisely defined by reference to the census. It will be recalled that 24 percent of the families in Marin County reported incomes of $9,000 or less. On the 1971 panel, six persons or 20 percent reported incomes of $9,000 or less (Peo. Exh. E). This is fair and substantial, representation of low income persons. But, even if there were a substantial disparity showing significant underrepresentation, this would not support a finding of discrimination, since the judges made affirmative efforts to include a broad range of persons of different income, occupation and economic status.

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based on blue-collar occupations amounting to 49 percent of the population (RT 1777) when in fact it was only 25 percent. Hence, the probative value of Dr. Sperlich's calculation is doubtful.

CONCLUSION

We respectfully submit that the California Court of Appeal correctly ruled that the 1971 grand jury panel in Marin County was selected in a constitutionally permissible manner based on undisputed evidence of affirmative efforts by the selectors to obtain a fair cross-section of the county on the panel and constitutionally acceptable explanations for any statistical imbalance. There was no evidence of deliberate discrimination and no evidence of discrimination in past years.

For the above reasons, we respectfully request that the petition for writ of certiorari be denied.

Dated, May 27, 1975.

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(Appendix A Follows)

Appendix A

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In the Superior Court
of the State of California
for the County of Marin

No. 3744

The People of the State of California,
Plaintiff,
vs.
Angela Y. Davis and Ruchell Magee,
Defendants.

DECLARATION OF EDMAR D. HICKS

State of California
County of Marin—ss.

Edmar D. Hicks, under penalty of perjury, declares that:

1. I am a supervisor in the Office of the County Clerk of Marin County; I have been employed in that Office from 1962 until the present.

2. Since 1964 I have performed clerical duties and maintained records for Marin County grand juries. In the course of my employment I have observed the grand jury nominees convene for the random selection of the new grand jury. I am personally acquainted with a number of grand jury nominees over the past years.

3. Based upon my personal knowledge and observation, and upon records maintained in the Marin County Clerk's Office listing the total number of nominees for each year and their respective addresses, I declare that at least the following black persons were nominated in the listed years:

Year	Total Nominees	Black Nominees
1970	30	1. Mr. Clarence Hebert 719 Drake Avenue Marin City, California
1969	29	1. Mrs. Juanita S. Cobb 31 Burgess Court Marin City, California
		2. Mr. Ellie H. Johnson 31 Buckelew Street Marin City, California
1968	26	1. Mrs. Orpha E. Barnes 85 Buckelew Street Marin City, California
		2. Mr. Harold Jackson 30 Locust Street Larkspur, California
		3. Mrs. Dorothea Mitchell 14 Dutton Court Marin City, California
1967	27	1. Mr. Alvis Allen 49 Cole Drive Marin City, California
		2. Mr. Arthur Miller, Jr. 89 Cole Drive Marin City, California
1966	25	1. Mrs. Annie Mae Plummer 99 Cole Drive Marin City, California
1965	25	1. Mrs. Juanita S. Cobb 31 Burgess Court Marin City, California
1964	25	1. Mr. Leonard L. Turner House 136-A Marin City, California
1963	25	1. Mr. Jesse S. Berry Bldg. C-44, Apt. 348 Marin City, California
1962	25	1. Mr. Theo Barron Marin City, California

Dated, Feb. 24, 1971

/s/ Edmar D. Hicks
Mrs. Edmar D. Hicks

Subscribed and sworn to before me this 24th day of February, 1971.

Seal Francelle Warner

Notary Public for said County and State

My Commission Expires
February 21, 1975